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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 563.

GREAT NORTHERN RAILWAY COMPANY,

Petitioner,

vs.

DELMAR COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S BRIEF.

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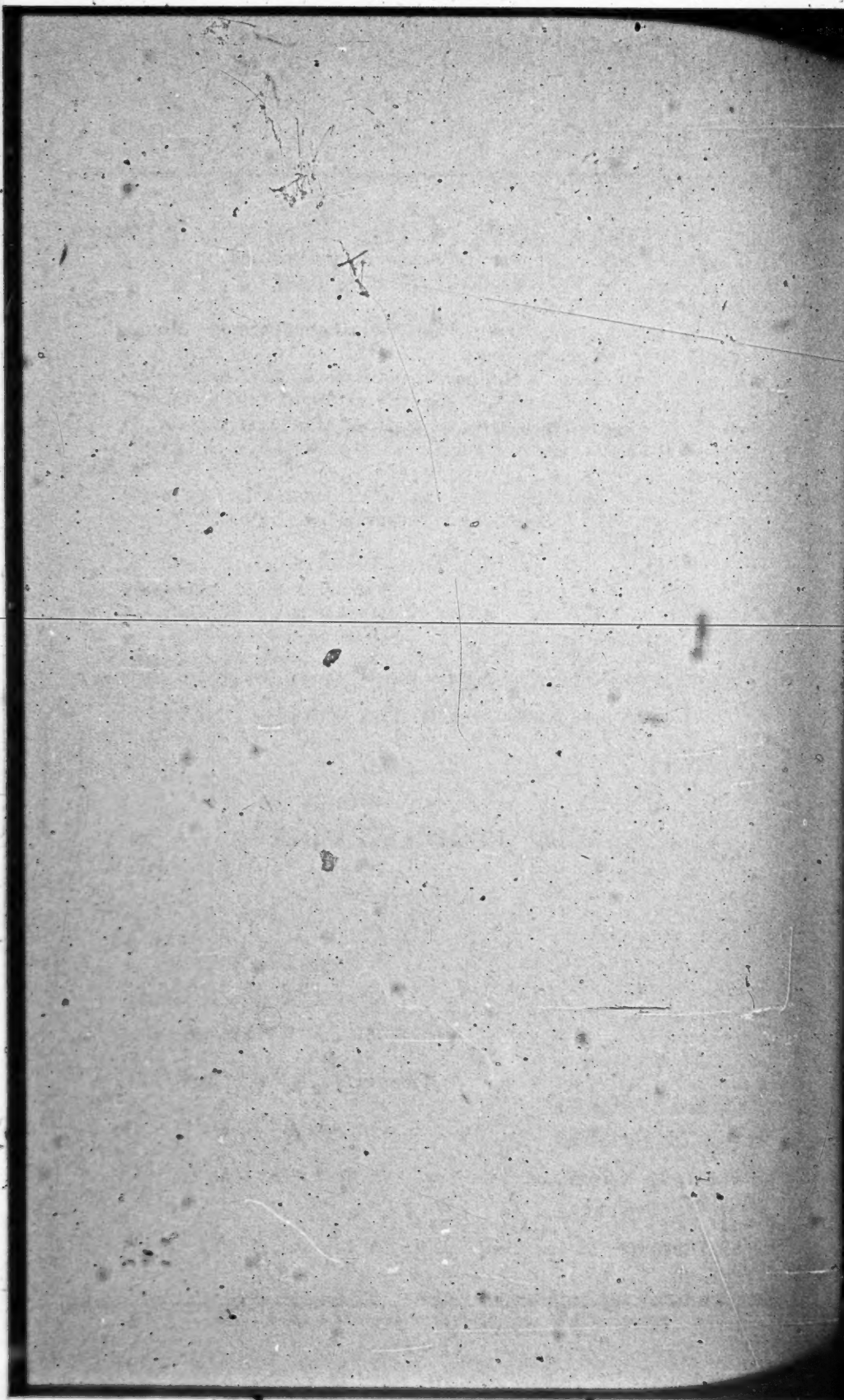

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RESPONDENT'S BRIEF.

STATEMENT OF FACTS IN SUPPORT OF RESPONDENT'S POSITION.

The Delmar Company (a corporation) filed on December 4, 1924, with the Interstate Commerce Commission, its complaint (R. 60) asking for a finding that on certain shipments of grain from points of origin in North Dakota, South Dakota and Minnesota to Superior, Wisconsin, the Great Northern Railway Company made certain overcharges and to fix the amounts thereof. The Commission issued its order, dated March 20, 1926, finding that overcharges had been made, and by supplemental order dated October 10,

1927, the Commission issued its further order requiring the Great Northern Railway Company to pay to the Delmar Company the sum of Six Hundred Forty-eight and Eighty-four Hundredths Dollars ($648.84), with interest. The Great Northern Railway Company declined to pay said sum, and this proceeding was instituted to collect said sum of Six Hundred Forty-eight and Eighty-four Hundredths Dollars ($648.84) and interest.

The shipments were originally billed to Minneapolis, Minnesota, in every instance, and by virtue of authority of tariffs on file, the inbound bills of lading were surrendered and the grain re-shipped to Superior, Wisconsin, all in accordance to tariffs regularly published. The tariff covering shipments from points of origin to Superior, Wisconsin, contained no restrictions as to routes that the shipment would traverse. An examination of the map (R. 68) shows that there are several possible routes the shipment might traverse—the shortest route from points on the Aberdeen branch being via Tintah, Evansville, St. Cloud to Duluth, but the testimony of Mr. Beidelman (R. 24) shows the regular movement of this traffic billed to Superior is via Willmar.

We understand the contention of the Petitioner is that when they have published a tariff between two points where there are a number of possible routes, that without publishing a rule in the tariff, the Railroad Company can arbitrarily restrict the application to the particular route, which the carrier may, for any reason suitable to itself, in the secrets of its own organization, designate.

The Respondent contends, and the order of the Interstate Commerce Commission so holds in accordance with the Commission's well established practice, that if the carrier has not exercised its privilege to restrict the route in its tariff, that the rate is available by any "open" route.

The Interstate Commerce Commission found, as an ultimate fact, that the rate via Minneapolis was an "open" route (120 I. C. C. 530, 533) (R. 55), and the Trial Court, in interpreting appellant's tariff, sustained the Commission's finding (34 Fed. (2nd) 221, 222), which latter decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit (43 Fed. (2nd) 780).

The Respondent contends that the Commission's determination that the route traversed was an open route carries with it a finding of all necessary facts, such as available, workable and reasonable route, and that that finding of fact was within the scope of its administrative authority and should not be set aside.

ARGUMENT.

I.

Duty of Commission.

The Supreme Court in *Meeker & Company vs. Lehigh Valley Railroad,* 236 U. S. 412, 427, 428, states that the statute requiring the Interstate Commerce Commission to make findings of fact in its investigation means that the Commission shall find the ultimate facts, which, when applied to a particular case, would disclose:

(a) The relation of the parties as Shipper and Carrier in Interstate Commerce;

(b) The character and amount of traffic out of which the claims arise;

(c) The rates paid by the Shipper for the service and whether they are according to the established tariff;

(d) Whether the rate collected was excessive and unreasonable, and if so, what would have been a reasonable rate for the service; and

(e) If the rate was excessive and unreasonable, the Shipper was injured thereby, and if so, the amount of damages sustained.

The Interstate Commerce Commission, in its report (120 I. C. C. 530), found:

"That complainants * * * made shipments over the Great Northern and paid and bore the charges thereon; that they were damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the applicable rate; and that they are entitled to reparation, with interest" (R. 59).

and—

"The route from points of origin herein through Minneapolis to Superior was an open route, and in the absence of restricted routing it must be found that the through rates to Duluth applied over the route traversed" (R. 55).

II.

The Commission Found That the Route Through Minneapolis Was an Open Route.

The Petitioner would have the Court believe that Respondent's contention is that the published tariff should apply over any route the shipper may designate, no matter how circuitous, because the tariff did not expressly restrict the application of the rate to the direct route. The Respondent makes no such contention, but the Commission has found that the tariff was silent as to the routes over which the rates would apply, and that the route actually traversed was an open route, necessarily inferring from such finding that it would not be unreasonable to interpret the through rates as applying to that particular route. The Commission had

before it all the evidence with reference to the route traversed, and after due consideration must have believed that the route via Minneapolis, as well as being available and workable, was reasonable under the circumstances, or it would not have made the finding that it was an "open route."

III.

The Commission's Ruling, in the Case at Bar, Follows its Long and Well Established Practice of Tariff Interpretation.

The Commission cited in its report *Pioneer Lumber Company vs. Director General*, 74 I. C. C. 288, 289 (R. 55), respecting shipments from Puget Sound via Minneapolis to Superior—

> "At the time of movement the rates to Minnesota Transfer also applied to Duluth via the 'Northern Pacific Railway,' but defendants argue that they applied only by way of the direct route through Staples and Brainerd, Minnesota, and not over the route of movement, which is 146 miles longer. *There was nothing in the governing tariffs which restricted the application of the rates to a particular line of the Northern Pacific. The route through Minnesota Transfer is workable* and in the past the Northern Pacific tariffs have specifically provided for the application of the Duluth rates through that point. In the absence of a restricted routing, it must be held that the rates to Duluth applied over the route of movement."

In the above case the movements, as in the case at bar, were made entirely over the rails of one carrier. The Commission found that the route through the Minnesota Trans-

fer was a workable route *(which we interpret to mean a reasonable route)*, and that fact, together with the lack of any specific routing being named in the tariff, forms the basis of its order for reparation.

The Commission in *Mason Brothers vs. Southern Pacific Company, et al.*, 28 I. C. C. 402, 405, held—that shipments originating at Lodi, California, and consigned to Minneapolis, subsequently reconsigned to New York, should take the through rate to New York. Also the most direct route would have been through Omaha direct to Chicago and then on to New York. The circuitous out of line movement via Minneapolis made the haul about 265 miles greater than by the direct route. Although the rate published was a joint through rate the Commission said:

> "We find no tariff authority for application of the joint through rate plus the rate of 18c from Minneapolis to Chicago."

The tariff under which these shipments were made designated no routes east of Ogden or Salt Lake City, Utah. It is reasonable to infer therefrom that the Commission deemed the route of movement, a reasonable open route.

Combination rates were charged the shipper in *Van Dusen Harrington Co. vs. Chicago, Mpls. & St. Paul Ry. Co.*, 47 I. C. C. 59, in which case shipments originating at points in Iowa and Nebraska consigned to Minneapolis were reshipped to various points in California. The joint rate published was 55c for shipments from origin points to final destination. Combination rates of 66.5c, composed of rates of 11.5c to Minneapolis and 55c beyond, were paid. The Commission in awarding reparation stated:

> "There was nothing in the tariff naming the 55c rate that would have precluded complainant from routing

the shipments through Minneapolis had they been billed through to the California points in the first instance. If it was defendant's purpose to restrict the application of the joint rate to any particular route and the reconsigning privileges authorized in connection therewith to any particular point, it should have been done by clear and unequivocal language" (47 I. C. C. 59, 61).

The route of movement was undoubtedly found by the Commission to be a reasonable one.

In *Western Cement Rates*, 132 I. C. C. 273, the question of the reasonableness of the applicable routes was taken up and discussed at length. The Commission applied the reasonableness construction in the *Atwood Davis Sand Co. vs. C. & N. W. Ry. Co.*, 136 I. C. C. 471, 475, when it said:

> "All of these routes are over the lines of a single carrier in the general direction of the destinations to which specific rates were named, and the distances over such routes to those destinations exceed the corresponding distances over the routes by only a few miles. To construe the governing tariffs in the absence of any routing restriction, as providing for the application of the specific rates over all of these routes, can not be said to be a strained and unnatural construction."

And the Commission cites *Richardson Sand Co. vs. Director General*, 89 I. C. C. 555, as supporting this last contention. Respondent here contends that the governing tariff was the published tariff for shipments moving from origin points to Superior, regardless of the fact that shipments were first consigned to Minneapolis and later reconsigned to Superior. The fact that the Minneapolis route was an open route is what we believe to be the controlling factor. Fol-

lowing are some cases where the open route principle has been applied:

Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co., 35 I. C. C. 172.

Meeds Lumber Co. vs. Director General, 59 I. C. C. 243.

Freeman Grain Co. vs. Director General, 68 I. C. C. 559.

Pioneer Lumber Co., et al., vs. Director General, & N. P. Ry. Co.; 74 I. C. C. 288.

Baker-Reid Lumber Co., et al., vs. B. & O. R. R. Co., 74 I. C. C. 489.

Richardson Sand Co. vs. Director General & C. & N. W. Ry. Co., 89 I. C. C. 555.

Scott County Farm Bureau vs. A. & V. Ry. Co., 101 I. C. C. 357.

Browne-Hinton Wholesale Grocery Co. vs. Gt. Nor. Ry., 102 I. C. C. 237.

Delmar Co. vs. Gt. Northern Ry. Co., 120 I. C. C. 530.

Northwestern Fruit Exchange vs. Gt. Northern Ry. Co., 128 I. C. C. 538.

It is not necessary for us to contend that where the tariffs have not restricted the routing but shippers have attempted to apply the rates over routes which were circuitous, that in every instance the rate would apply. The finding of fact that the route via Minneapolis was an open route, eliminates the question of fact as to whether the route traversed was unreasonably circuitous.

The Commission held in 68 I. C. C. 559, *Freeman Grain Company vs. Director General, as Agent*, that shipments being made over rails of two carriers, where joint rates were published but no routes designated, were subject to the rates

applicable over direct routes, although the actual movements were circuitous.

They said:

> "The rate was not restricted in its application to any particular route. * * * It is contended for Defendant the 64c joint rate was not applicable under the inspection and reconsigning rules referred to for the reason that Salina is not 'directly intermediate' from Lucas to the points of ultimate destination, the distances by way of Salina being 78 miles greater than those over the branch line through Colby. * * * It is not disputed that normally traffic from Lucas to Western points moves through Colby. * * * However, there was nothing in the tariff naming the joint rate which would have precluded complainant from routing the shipments through Salina had they been billed direct from Lucas to California points."

Here the Commission evidently held that the through rate should apply *solely* because the tariff did not restrict the routing. We do not base our contention (as stated above) on this fact alone, but on the reasonableness of the route as can be inferred from the Commission's finding.

Petitioner, through its traffic witness, Beidelman, testified (R. 34) that under Respondent's interpretation, utterly absurd results would follow by reason of an illustration given of the distance between Granville, North Dakota, and Genoa, North Dakota, to be 21 miles over the shortest route, and a distance of 1,100 miles between the same points by way of Boylston, Wisconsin.

The Commission has not found that the last mentioned route is an open or reasonable route, nor did it have any such question before it for determination. The Commission

in the Delmar case, found that the route traversed was an open route, which must have included a reasonable, available, practical route.

As shown by the table of distances on page "531" of the Commission's Report (R. 53), the maximum of circuity of any of the shipments is 23%. The Commission has repeatedly held that such circuity is reasonable, and in the case of *Western Cement Rates*, 132 I. C. C. 273, where distances were prescribed, carriers were permitted to meet the rate of the shorter line for distances up to 150 miles, if the circuity was not over 70%. If custom determines interpretation of tariffs, it appears that the decisions of the Interstate Commerce Commission commencing with the case of *Van Dusen Harrington Co. vs. C. M. & St. P. Ry. Co. (supra)*, decided in 1917 and cases following, greatly outweight the Railroad Company's claimed practice.

IV.

The Commission's Interpretation of the Tariff Cannot Be Construed a Violation of Paragraph (7), Section 6, Interstate Commerce Act.

Petitioner contends in its brief (pp. 16-18) that to apply the direct through rate would be to allow respondent a privilege in conflict with paragraph (7), Section (6) of the Interstate Commerce Act (49 U. S. C. A., Sec. 6) forbidding such privileges.

We have not been able to find any reference made by the Commission in the numerous cases cited above to the effect that their holding that rates applying over reasonably circuitous routes, allowed any special privileges or facilities. We contend that a movement over an open and reasonable

route is not a privilege or facility within the meaning of the Act. *Kerns & Sons vs. C. M. & St. P. Ry.*, 40 I. C. C. 552, 554, as cited by Petitioner on page "17" of its brief, is not applicable to our case. In that case the Commission said:

> "But the 17.5c rate applicable on this basis was not applicable to the complainant's shipment, for the reason that defendant's tariffs made no provision for reconsignment. * * * The defendant stated in its answer that the diversion of complainant's shipment would have been effected, and 'without requiring extra service,' if defendant's agent at Dayton had sought the advice of the proper officials promptly" (p. 553).

The Petitioner has not questioned the right of Respondent to reconsign the shipments from Minneapolis to Superior and the Commission found that complainant (Respondent) admittedly complied with the requirements of the applicable reconsigning rules (120 I. C. C. 530, 531—R., p. 56). We contend, therefore, that any reference to any unlawful privilege being granted is inapplicable, for that particular point is not in issue. The other cases referred to (Petitioner's Brief, p. 17) as privilege cases have no bearing whatsoever on our case.

V.

A Tariff Published Under Rules of Interstate Commerce Commission Is in Effect the Law Governing Shipments Thereunder.

In *Pillsbury Flour Mills Co. vs. G. N. Ry. Co.*, 25 Fed. (2nd) 66, 68, the Court says:

> "The Tariff, so long as it is of force, is in respect,

of rates named, to be treated as though it were a statute, binding as such upon the railroad and shipper alike."

In this and the Court's statement in *G. N. Ry. Co. vs. Merchants Elevator Co.*, 259 U. S. 285, 290 (Petitioner's Brief, page 11)—"Every question of the construction of a tariff is deemed a question of law," we concur. But we do not concur in the Petitioner's contention that it should be their privilege to interpret the tariff (conceded to be statutory law) in their own manner. A tariff filed with the Interstate Commerce Commission, being the creature of the Railroad Company, should be interpreted strongest against the Company if the usual rules of construction of documents and contracts are followed.

We have in our case the established facts that there were several available open routes over which the shipments could move—one of the routes is claimed by Petitioner to be the usual route used over which Petitioner contends the through rate applies, and the other the route via Minneapolis actually traversed. Respondent contends that it should not be within the power of the carrier, where there is no designation of routing, to say that the rate shall apply only over that route which happens to be most direct, or most convenient to the carriers.

The purpose of the Interstate Commerce Act in prescribing published tariffs is so that all shippers may be cognizant of the rates, routes applicable, and other rules and regulations, and no shipper given any special privileges not allowed every other shipper. The right of the carrier to so designate the routes is its privilege. If it does not avail itself of that privilege to so restrict the rates to certain routes, then it does not have the right to restrict the rates to certain routes other than by filing published tariffs.

The Commission has interpreted the duty of the carrier in this respect in *Newton Gum Co. vs. C. B. & Q. R. R. Co., et al.,* 16 I. C. C. 341, 346—

"In their brief Defendants urge:

'We contend that uniform and long usage controls as to the interpretation of tariffs, just as a uniform construction put upon a contract by the parties thereto controls in the interpretation thereof.' * * * The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with a knowledge of the intention of the framers or the carrier's cannons of construction or some other tariff not even referred to in the one carrying the rate. The public posting of tariffs will be largely useless if the carrier's interpretation is to be dependent upon tradition and the arbitrary practices of general freight officers. This Commission has long since repudiated the suggestion that railroad officials may be looked to as authority for the construction of their tariffs. (See *Hulbert vs. L. S. & M. S. Ry. Co.,* 2 I. C. C., p. 122.) We quote from Judge Cooley's opinion in that case:

'A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms so that the ordinary business man can understand it, and in connection with the rate sheet, can determine for himself what he can be lawfully charged for transportation. The committee who prepared this classification HAVE NO MORE AUTHORITY IN CONSTRUCTION THAN ANYBODY ELSE and they must leave the document, after they have given it to the public, to speak for itself.' Tariffs are to be construed according

to their language. The Commission can recognize no other criterion."

For further reference to the same contentions see the following:

Bon Marche vs. C. R. R. of N. J., et al., 21 I. C. C. 195, 196.

Pacific Coast Biscuit Co. vs. S. P. & S. Ry. Co., 20 I. C. C. 546, 549.

Sea Gull Specialty Co. vs. Baltimore S. P. Co., 27 I. C. C. 267.

Chas. Boldt Co. vs. P. C. C. & St. L. Ry. Co., et al., 42 I. C. C. 308.

Sea Board By-Product Coke Co. vs. Director Gen., 62 I. C. C. 317.

St. Tammany Ice & Mfg. Co., Ltd., vs. Director Gen., et al., 64 I. C. C. 491; and

I. & S. Docket 1786, Routing of Grain and Products, 81 I. C. C. 725.

Respondent's interpretation of the carriers being required by law to publish the rate is that it shall clearly indicate the route over which the published rate is applicable. When so published the rate named and the route designated stand as the law, binding as well upon the shippers as upon the carrier. A schedule of rates published in the manner provided by law speaks with equal authority to the shipper and to the carrier, and both are equally chargeable with notice of the rate and of the route over which the rate is made applicable. Where it fails to designate the route, the rate must fairly be interpreted to mean that it applies over all reasonable routes.

VI.

The Fourth Section of the Interstate Commerce Act Does Not Affect the Legal Right of the Parties to This Proceeding for the Reason That a Rate Published That Is a Violation of the Fourth Section Remains the Legal Rate Until Changed.

As we understand it, the Commission claims that the tariff as construed by it (120 I. C. C. 530) results in certain Fourth section violations over the longer route. Assuming this contention is correct, yet the Commission properly held that the published tariff rate was applicable, for this rate is binding upon both carrier and shipper although it may violate Section 4 of the Act.

The decision of Judge Bryan of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Beaumont, Sour Lake & Western Ry. Co. vs. Magnolia Provision Co.* (etc.), 26 Fed. (2nd) 72, which case was before this Court under Petition for Certiorari, and the same denied October 15, 1928, 278 U. S. 620, sets forth Respondent's position quite fully and we therefore quote him at length:

> "Appellants liken a published tariff rate to a contract between the carrier and the shipper in support of the argument that a mistake can be corrected so as to give effect to the intention of the parties. A shipper has no voice in the fixing of rates, but must pay the published rate, and can only make claim of reparation on account of a rate that is unjust or discriminatory. The Supreme Court has held that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper. *Penn. R. R. Co. vs. International Coal Co.*, 230 U. S. 184, 33 S. Ct.

893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6; Comp. St. Sec. 8569) provides that a carrier shall not charge or receive any different compensation, whether greater or less, than that shown by the file and published schedule of rates. It is well settled by Supreme Court decisions that this provision of law must be strictly complied with because it is necessary to carry out the purpose of Congress to prevent unjust discrimination. *Gulf, Colorado & Santa Fe R. R. Co. vs. Hefley,* 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910; *New York, New Haven & Hartford R. Co. vs. Interstate Commerce Commission,* 200 U. S. 361, 26 S. Ct. 272, 50 L. Ed. 515; *T. & P. R. R. Co. vs. Mugg,* 202 U. S. 242, 26 S. Ct. 628, 50 L. Ed. 1011; *L. & N. R. R. Co. vs. Mottley,* 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; *Keogh vs. Chicago & N. W. R. R. Co.,* 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183. In *Lamb-Fish Lumber Co. vs. Y. & M. V. R. R. Co.,* 42 I. C. C. 470, the Interstate Commerce Commission announces the rule that proof of error in the publication of rates does not justify a departure from the published rates, even though shippers have full knowledge that the rates were published by mistake, and that decision was cited with approval by the Supreme Court in *Davis vs. Portland Seed Co.,* 264 U. S. 403, 424, 44 S. Ct. 380, 68 L. Ed. 762. The carriers cannot defend by showing that published rates, if enforced, would violate the long and short haul clause and subject them to penalties. Such a showing would only be evidence of intention indicating that a mistake was made. Because of the policy of the law, the rate must be abided by as long as it is included in published schedules of rates. The remedy of the car-

riers is to apply to the Interstate Commerce Commission to have the rate changed."

In *Davis vs. Portland Seed Co.* (just above), this Court said:

"The record shows, we think, that the carrier violated the statute by publishing the lower rate for the longer haul without permission, and, prima facie, at least, incurred the penalties of Sec. 10. Also, it became 'liable to the person or persons injured thereby for the full amount of damages sustained in consequence of * * * such violation,' together with reasonable counsel fees, as provided by Sec. 8. But mere publication of the forbidden lower rate did not wholly efface the higher intermediate one from the schedule and substitute for all purposes the lower one, as a supplement might have done, without regard to the reasonableness or unreasonableness of either"; and that

"The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified."

In *Interstate Remedy Company vs. American Express Company,* 16 I. C. C. 436, 439, the Commission said:

"The question is not raised in this case as to the legality of such a rule and rate as here involved, and we do not pass thereon. But even if it should eventually be held that a carrier may not lawfully make a lower rate upon a returned shipment than would apply if it were an original shipment, we are of opinion that the carrier may not plead the unlawfulness of its tariff to avoid extending the benefit thereof to a shipper. While it has been repeatedly emphasized by the Commission that the shipper is put upon notice of the rate

by the publication of the tariff, it has not been held that a shipper must determine for himself the lawfulness of a rate, regulation, or practice, upon his peril. The responsibility rests upon the carrier to have lawful rates and rules in effect, and every shipper may with safety rely upon such rates without fear that they will be withdrawn as illegal after he has made shipment thereon, resting in the confidence that they are lawful so long as they are in force. If subsequently found to be unlawful, the carrier is subject to penalty for the institution and maintenance of such rates or rules, but the law does not contemplate that the shipper shall move upon any other theory than that the provisions of the carrier's tariff are in full compliance with the law's demands."

The error of the carrier in publishing a rate which violates the Fourth section or its failure to correct such error does not prevent application of the published tariff rate. Even if the language in the Circuit Court of Appeals' decision regarding the Fourth section were disapproved, that should not in any way affect the decision of this case.

VII.

Weight Given to Order of Interstate Commerce Commission.

Where the facts are undisputed, it is essentially one of the functions of the Interstate Commerce Commission to determine what is the correct order to make, and its conclusion is binding unless based on some mistake of law. In *Davis, Director General of Railroads vs. Prairie Pipe Line Co.*, 298 Fed. 393, the Court says:

"The question in the case is: What were the tariff rates applicable to these shipments?" (p. 394),

and on page 396,—

"Courts have given weight to the findings of the Interstate Commerce Commission as to questions properly before them. As to questions of fact, where there was ample evidence to sustain them, the Supreme Court of the United States has said the findings of the Commission thereon are conclusive."

(Louisville & Nashville Railroad Co. vs. United States, et al., 245 U. S. 463.)

In *United States of America vs. Louisville & Nashville Railroad Company,* 235 U. S. 314, the Court says:

"The very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *(East Tenn., etc., Ry. Co. vs. Interstate Commerce Commission,* 181 U. S. 1, 23-29.) And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review * * * show the progressive evolution of the legislative purpose, etc." (p. 320).

The following case, although the Commission's order for reparation was based on the interpretation of a joint rate, we believe to express our contention that the order of the Commission should not be set aside: *Empire Refining Co. vs. Davis, Director General,* 6 Fed. (2nd) 305, 306,—

"In an action based on a reparation award made by

the Interstate Commerce Commission, covering an overcharge in freight rates based on a combination joint rate, the Commission had found that the Director General had overcharged on the shipment. In commenting on the Commission's decision, the court said: *The technical subject of tariff construction is one which ordinarily the Commission, because of its composition of members with special experience, knowledge, and training in that subject, is better able to correctly solve than the courts, and its decisions are a helpful guidance to the courts in arriving at correct conclusions in such matters.*"

In our case the rates in question apply only over the route of one carrier, but we see no reason for a different rate applying in such case than in the above. A large percentage of shipments that start out as local become joint before they reach destination under the privileges of the reconsigning tariffs, but the Commission has held as well that the rates should apply in the same manner where the line traversed is that of only one carrier.

(Pioneer Lumber Company vs. Director General, 74 I. C. C. 288, 289 *(supra).)*

In *Chicago, R. I. & P. Ry. Co. vs. United States,* 6 Fed. (2nd) 888, 889, 890, the Court said:

"The proceeding was quite within the jurisdiction of the Commission, and its carefulness and exhaustive investigation, and the completeness of the orders issued by it, preclude any thought of the arbitrary or unreasonable. If that be true the Courts have no power to interfere."

In *Seaboard Air Line Railway Company, et al., vs. United*

States, et al., 254 U. S. 57, 62, the Court makes the following statement:

> "Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority."

In *Manufacturers Railway Company and St. L. & S. W. Ry. Co. vs. United States and Interstate Commerce Commission*, 246 U. S. 457, 482, the Court remarked:

> "The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding * * * but *to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done.*"

Following are a few cases where questions similar to ours have been presented to and decided upon by the Interstate Commerce Commission, and which will, we believe, aid the Court in determining how the orders of the Commission have been interpreted:

Interstate Commerce Commission vs. Union Pacific Railroad Company;

Same vs. Northern Pacific Railway Company;

Same vs. Great Northern Railway Company, 222 U. S. 541, 547,

in which the Court says:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise, or (2) beyond its statutory power, or (3) based upon a mistake of law. * * * In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. *It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. The findings of the Commission are made by law prima facie true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. Ill. Central vs. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Proctor & Gamble Company vs. United States, et al.*, 225 U. S. 282, 297-298, the Court said:

"Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced, carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission for the purpose of enforcing or restraining

their enforcement, the courts were confined by statutory operation to determine whether there had been violations of the constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so."

And in *Pennsylvania Company vs. United States*, 236 U. S. 351, 361, the Court states:

"If the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission."

See also:

Atchison, Topeka & Santa Fe Railway Company vs. United States, 232 U. S. 199, 220, 221.

Interstate Commerce Commission vs. Illinois Central Railroad Company, 215 U. S. 452, 469-70.

CONCLUSION.

We submit that the order of the Trial Court and the Circuit Court sustaining the Interstate Commerce Commission should be affirmed.

(1) It is in accordance with a long established rule of interpretation of tariffs.

(2) It is a reasonable rule in that any other interpretation of the tariff would open the way for discrimination between shippers by differing opinions of railroad officials.

(3) The order of the Interstate Commerce Commission

in finding the route traversed as an "open" route, is an ultimate finding of fact that must mean that in the Commission's opinion, the route was available and reasonable under all the circumstances.

Respectfully submitted,

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